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ARTICLES

Confrontation and Hearsay Issues in Federal Court Terrorism Prosecutions of Gitmo Detainees

*MOUSSAOUI AND PARACHA AS HARBINGERS?**

Norman Abrams[†]

In tribute to Professor Margaret A. Berger

I. INTRODUCTION

Professor Margaret Berger is best known as a distinguished Evidence scholar on the subject of expert testimony. Her work includes, however, an important paper on the Confrontation Clause, published in 1992, titled, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*,¹ which was one of the earliest articles to foreshadow Justice Scalia's majority opinion in the Supreme Court's 2004 decision in *Crawford v. Washington*.²

I dedicate this paper as a tribute to Margaret's oeuvre on evidence and in celebration of that article, noting that she presciently anticipated the general change of direction by the Court, although *Crawford* took a different, related doctrinal

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¹ 76 MINN. L. REV. 557 (1992).

² 541 U.S. 36 (2004). Scholarly works cited by Justice Scalia in *Crawford* include AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 125-31 (1997) and Richard Friedman, Essay, *Confrontation: The Search for Basic Principles*, 86 GEO. L. J. 1011 (1998). *Crawford*, 541 U.S. at 61; see also Benjamin E. Rosenberg, *The Future of Codefendant Confessions*, 30 SETON HALL L. REV. 516 (2000).

approach to the application and scope of the Confrontation Clause.

This paper will examine the implications of the 2004 Fourth Circuit compulsory process decision in *United States v. Moussaoui*,³ and also refer to its 2008 Second Circuit progeny, *United States v. Paracha*.⁴ It will use the doctrine of those cases, considered in light of the Supreme Court's decisions in *Crawford* and *Davis v. Washington*,⁵ as the basis for an exercise to examine how certain types of confrontation and hearsay issues might be analyzed in future terrorism prosecutions in the federal courts—applications that neither Justice Scalia nor Professor Berger may have anticipated.

II. CRAWFORD V. WASHINGTON AND PROFESSOR BERGER'S PROPOSAL

It is, of course, familiar stuff to evidence scholars that *Crawford* dramatically shifted the Court's approach to the Confrontation Clause, holding that "[t]estimonial statements of witnesses absent from trial" are admissible "only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine [the witness]."⁶ The key to this new doctrinal development is the notion of *testimonial* statements, which Justice Scalia, relying on and applying the history behind the Confrontation Clause, described in the following terms:

An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist, [e.g.]: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" These formulations all share a common

³ 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

⁴ 313 F. App'x. 347 (2d Cir. 2008). The circuit opinion, which was not certified for publication, treats the relevant issues summarily. For a fuller treatment, see the district court opinion, *United States v. Paracha*, No. 03-CR-1197(SHS), 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006).

⁵ 547 U.S. 813 (2006).

⁶ *Crawford*, 541 U.S. at 59.

nucleus and then define the Clause's coverage at various levels of abstraction around it

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive.⁷

Twelve years before *Crawford* was decided, Professor Berger advocated a related approach:

Hearsay statements procured by agents of the prosecution or police should therefore stand on a different footing than hearsay created without government intrusion. The Confrontation Clause should bar hearsay statements elicited by governmental agents unless the declarant is produced at trial or unless special procedures [which she later describes] . . . are followed.⁸

Both approaches would apply the Confrontation Clause to hearsay statements obtained by governmental agents for use at trial. The main difference appears to be that Justice Scalia uses a doctrinal category, “testimonial statements,” to characterize the type of hearsay covered by the Confrontation Clause while the emphasis under Professor Berger’s proposal is on the fact that the statement was procured by government agents and on government behavior. Rather than relying on a formulaic approach, she proposes one that would focus on the circumstances of the particular case and identify whether inappropriate forms of prosecutorial behavior were involved: Inter alia, she recommends that contemporaneous recordings be used in appropriate cases to ensure that the prosecutor or police did not pressure, induce, or manipulate the declarant into making the statement. She views the Confrontation Clause as a limitation on government action, as a way of keeping “the overwhelming prosecutorial powers of the government in check.”⁹

Use of the formulaic approach led Justice Scalia in *Davis v. Washington* to add a qualification to the definition of “testimonial,” and a key question for this paper is how broadly the *Davis* doctrine is to be interpreted. The very use of the definitional term, “testimonial,” thus carries with it

⁷ *Id.* at 51-52 (quoting Brief of Petitioner at 23, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)).

⁸ Berger, *supra* note 1, at 561-62.

⁹ *Id.* at 562.

substantive implications. It is not clear whether Professor Berger would recognize a similar categorical limitation since governmental action would still be involved even in situations excluded from the coverage of the Confrontation Clause under the Scalia approach in *Davis*. If not, her approach would sweep more broadly than Justice Scalia's and might bring more statements under the protection of the confrontation mantle.

III. THE IMPLICATIONS OF *DAVIS V. WASHINGTON*

As noted above, *Crawford* ruled that the introduction into evidence by the prosecution of out-of-court statements that are testimonial, where the declarant is unavailable and the statements had not been subject to prior cross-examination, violates the Confrontation Clause. *Davis v. Washington* qualified *Crawford* by treating as nontestimonial certain types of statements elicited by police questioning.¹⁰ Recall that in describing the category of testimonial statements, Justice Scalia in *Crawford* stated: "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard."¹¹ We learn, however, from Justice Scalia's opinion in *Davis v. Washington* about statements obtained through police questioning that are nontestimonial:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

. . . .

. . . When we said in *Crawford* . . . that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. . . . A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed

¹⁰ *Davis*, 547 U.S. at 822.

¹¹ *Crawford*, 541 U.S. at 52.

primarily to “establis[h] or prov[e]” some past fact, but to describe current circumstances requiring police assistance.¹²

In *Davis*, Justice Scalia drew a distinction that had not surfaced in *Crawford*—between testimonial and nontestimonial statements that result from police interrogation. The distinction rests principally on what was “the primary purpose of the interrogation.”¹³ If the interrogation is “solely directed at establishing the facts of a past crime, in order to . . . provide evidence to convict . . . the perpetrator,” it is testimonial.¹⁴ If its primary purpose was “to meet an ongoing emergency,” or was “designed primarily . . . to describe current circumstances requiring police assistance,” it is non-testimonial.¹⁵

As we shall see further along in this paper, *Crawford* and *Davis* combined with *Moussaoui* and *Paracha* provide the basis for a line of argument that might be used to address confrontation concerns that would arise when the government tries to offer into evidence the results of the interrogation of suspected terrorists.

IV. THE DOCTRINE OF *UNITED STATES V. MOUSSAOUI* AND *UNITED STATES V. PARACHA*

A. *Compulsory Process/Classified Information Issues*

Zacarias Moussaoui was indicted for a series of terrorism offenses including involvement in the conspiracy that led to the horrific acts on September 11, 2001. The 2004 decision of the Fourth Circuit U.S. Court of Appeals in *United States v. Moussaoui*,¹⁶ the final direct review opinion among numerous *Moussaoui* decisions in the course of this prosecution, addressed compulsory process-classified information issues in the case.

*United States v. Paracha*¹⁷ involved similar issues, though the charges in that case were based on identification document fraud and providing material support to al Qaeda in aid of terrorism. In *Paracha*, the district court relied heavily on

¹² *Davis*, 547 U.S. at 822, 826-27 (citations omitted).

¹³ *Id.* at 822.

¹⁴ *Id.* at 826.

¹⁵ *Id.* at 827-28.

¹⁶ 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005). The opinion in volume 382 was a revised version of an earlier opinion, 365 F.3d 292 (4th Cir. 2004).

¹⁷ No. 03-CR-1197(SHS), 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006).

the *Moussaoui* opinion, and the circuit court summarily affirmed the lower court decision.¹⁸ The significance of these two *Paracha* opinions is not what they add substantively (though they do add slightly to the earlier *Moussaoui* case), but rather the fact that they are subsequent decisions that appear to indicate that, at least in a terrorism prosecution context, the *Moussaoui* doctrine that we examine in this paper is not “a derelict on the waters of the law.”¹⁹

The *Moussaoui* Fourth Circuit decision, by happenstance, was handed down immediately after the Supreme Court issued its opinion in *Crawford v. Washington*. Accordingly, while *Crawford* is mentioned twice in *Moussaoui*,²⁰ the references are brief. Neither the government’s nor the defendant’s brief in *Moussaoui* mentioned *Crawford* (since both briefs were prepared before the *Crawford* decision), although they do address some confrontation issues.²¹ *Moussaoui* is generally and correctly perceived as primarily involving, at a constitutional level, compulsory process issues; it is not a confrontation or hearsay decision. Yet, as discussed below, because of the way the court formulated its opinion, arguments regarding confrontation and hearsay issues in terrorism prosecutions can be derived from the case.

At the outset, two aspects of the *Moussaoui* opinion should be noted, which, while they make it more difficult to determine its meaning, do not prevent us from digging into the doctrine of the case. First, because the case involves classified information, the opinion is heavily redacted so that particular sentences are inconclusive and hard to decipher. (However, somewhat surprisingly, one can reasonably guess at some of the words that were deleted from the opinion.) Second, after the Supreme Court denied certiorari review of the circuit court’s opinion under consideration here, *Moussaoui* pleaded

¹⁸ United States v. Paracha, 313 F. App’x. 347, 351 (2d Cir. 2008).

¹⁹ Lambert v. California, 355 U.S. 225, 332 (1957) (Frankfurter, J., joined by Harlan, J. and Whittaker, J., dissenting). It should be kept in mind that *Moussaoui* is a Fourth Circuit opinion, and that Circuit has had the reputation of being one of the most conservative in the nation. See Neil A. Lewis, *Obama’s Court Nominees Are Focus of Speculation*, N.Y. TIMES, Mar. 11, 2009, at A19 (suggesting that because of the large number of potential appointments to that bench, President Obama has the possibility of turning the conservative Circuit quickly around). The fact that *Moussaoui* was followed by the Second Circuit in *Paracha* is therefore not without significance.

²⁰ See *Moussaoui*, 382 F.3d at 461, 481.

²¹ See Brief of Appellee at 81-84, *Moussaoui*, 382 F.3d 453 (No. 03-4792); see also Brief for the United States at 48-60, *Moussaoui*, 382 F.3d 453 (No. 03-4792).

guilty.²² The circuit court opinion had contemplated further action in the district court: the judge was expected to apply the approach mandated by the circuit majority to the substitutions, but the guilty plea served, to an extent,²³ to limit such action and also served to insulate the circuit court opinion from further direct review.

As it turned out, subsequently, Moussaoui attempted to withdraw his plea of guilty and in January 2010, a different circuit panel issued an opinion that revisited some of the relevant issues. This new opinion did not, however, change the essential conclusions of the first panel.²⁴

An important part of Moussaoui's defense had been to show that he was not involved in the 9/11 conspiracy. One of the important issues in the case revolved around Moussaoui's efforts to obtain testimony from three individuals, enemy combatant witnesses (the "ECWs") at the time allegedly in U.S. custody abroad, who were alleged to be key al Qaeda members involved in the 9/11 conspiracy.²⁵ Moussaoui asserted that these individuals could provide exculpatory testimony on his behalf—that he had not been involved in the 9/11 conspiracy.²⁶ At the time, the government declined officially to acknowledge that these men were in custody, assuming that they were only for purposes of allowing the court to make a ruling whether to issue a subpoena ad testificandum. The government refused, on grounds of national security, to produce the ECWs in person or to make them available so their depositions could be taken.²⁷

In an effort to resolve the impasse thereby created, a compromise was attempted by the Fourth Circuit Court of Appeals—to prepare substitutions for the testimony of these three witnesses. While the case did not directly bring into play the Classified Information Procedures Act ("CIPA"),²⁸ because live witness testimony was at issue, both the district and circuit courts relied heavily on the CIPA approach for dealing with classified evidence that the government does not wish to

²² United States v. Moussaoui, 591 F.3d 263, 271 (4th Cir. 2010).

²³ See *id.* at 271-72, 276 ("The substituted statements of . . . several other terrorists were . . . admitted as evidence during the sentencing proceedings.").

²⁴ See *id.* at 284-85. In considering Moussaoui's attack on his conviction and attempted withdrawal of his plea of guilty, the January 2010 opinion reiterated the previous panel's justifications for treating the substitutions as reliable. See *id.*

²⁵ *Id.* at 271, 287.

²⁶ *Id.* at 271.

²⁷ See United States v. Moussaoui, 382 F.3d 453, 456-57 (4th Cir. 2004).

²⁸ See 18 U.S.C. APP. 3 §§ 1-16 (2006).

produce because of concerns about the need for secrecy and confidentiality.²⁹ An important tool under CIPA for dealing with such evidence is to fashion substitutions, usually summaries, which do not disclose any of the information that the government wishes to keep confidential, but provide a defendant with enough evidence to enable him/her to make his/her defenses.

The district court had concluded that the substitutions that had been offered by the government did not and could not adequately protect the defendant's right to defend himself.³⁰ Reversing the lower court on this point, the circuit panel concluded that, with more work and participation by the district judge and the parties in the preparation of the substitutions, both the government's national security interests and the compulsory process and right-to-defend interests of the defendant could be adequately protected.³¹

The substitutions approved in principal by the court had unique features. They were summaries, but of what? The witnesses had not given depositions. Rather, detailed *statements (1)* from the putative three ECWs, labeled by the court as A, B and C, had been obtained, apparently through interrogation, by government agents seeking intelligence that could be used in preventing future terrorist actions and apprehending other terrorists.³² (We do not address in this paper any issues arising out of claims that the statements at issue might have been obtained by government agents or their surrogates through interrogation involving torture or other forms of coercion.)

The statements thus obtained from A, B, and C had then been "recorded" in "highly classified" *reports (2)* which had been prepared for "use in the military and intelligence communities; they were not prepared with this litigation" in mind.³³

Portions of the reports were then "excerpted and set forth in documents prepared for purposes of this litigation"³⁴

²⁹ See, e.g., *Moussaoui*, 382 F.3d at 471-72, 476-77.

³⁰ See *Moussaoui*, 591 F.3d at 284.

³¹ *Id.*

³² *Moussaoui*, 382 F.3d at 458.

³³ See *id.* at 458 n.5.

³⁴ *Id.*

which were labeled *summaries* (3). The summaries were provided to defense counsel³⁵ who had security clearance.

Finally, the *substitutions* (4) to be offered into evidence were prepared from the summaries. These largely consisted of the summaries of statements that had been obtained over the course of several months but were not identical to these summaries since in preparing the substitutions, the government had reorganized the information.³⁶

It is apparent from the foregoing that there were multiple levels of hearsay involved in the substitutions that were being considered by the court, with A, B, and C being the declarants at level 1, *supra*, and the declarants involved in the preparation of the documents labeled as levels 2-4 being unnamed government agents or employees.

The district court had “deemed the substitutions inherently inadequate because the . . . reports, from which the substitutions were ultimately derived, were unreliable.”³⁷ In part this was because “it cannot be determined whether the . . . reports accurately reflect the witnesses’ statements The [district] court further commented that the lack of quotation marks in the . . . reports made it impossible to determine whether a given statement is a verbatim recording”³⁸

Responding to the district court’s concerns, the circuit court stated:

The answer to the concerns of the district court regarding the accuracy of the [Redacted] reports is that those who are [Redacted] [ed. interrogating (?)] the witnesses have a profound interest in obtaining accurate information from the witnesses and in reporting that information accurately to those who can use it to prevent acts of terrorism and to capture other al Qaeda operatives. These considerations provide sufficient indicia of reliability to alleviate the concerns of the district court.³⁹

In the foregoing passage, the circuit court addressed two issues: first, whether the information obtained from A, B, and C was reliable, which it dealt with by stating that the questioners had “a profound interest in obtaining accurate

³⁵ The district court noted “that it had been impressed with the accuracy of the summaries.” *See id.* at 478 n.30 (internal quotation marks omitted).

³⁶ *See id.* at 478-79.

³⁷ *Id.* at 478.

³⁸ *Id.*

³⁹ *Id.*

information from the witnesses”;⁴⁰ and second, the accuracy of the recording of those statements in the reports, to which it responded with the statement, “[they] have a profound interest . . . in reporting that information accurately.”⁴¹

Relying on the fact that the interrogators’ motivation was to obtain accurate statements from A, B, and C for intelligence purposes (and, implicitly, that they were experts in this activity) and that the documents recording those statements were prepared in aid of a similar purpose, the court concluded that with adequate work by the district court and the parties, the substitutions could be prepared in a form that was reliable, and in that form the defendant could introduce them into evidence. Finally, the court ruled that the defendant was entitled to have the fact that the substitutions are reliable communicated to the jury via an appropriate instruction.⁴²

The court did not expressly parse the multiple levels of hearsay involved in this material, nor did it expressly identify the hearsay element that presented the greatest challenge to the court’s overall assessment that the substitutions were reliable, namely the reliability of the original statements by the declarants. The court did briefly further address reliability of this first level, however, when it made the following statement:

To the contrary, we are even more persuaded that the [Redacted] process is carefully designed to elicit truthful and accurate information from the witnesses.⁴³

Here the court seemed to introduce an additional idea to the argument based upon the government agents’ motivation to obtain accurate information: the very process [of interrogation (?)] was carefully designed to obtain truthful and accurate information.

In discussing the reliability of these out-of-court statements, the circuit court did not expressly mention the hearsay rules or discuss the issues in traditional hearsay terms. This is only somewhat surprising. Although the substitutions were hearsay and the court was addressing a traditional hearsay concern—namely, reliability—the court here was dealing with a compulsory process issue, not a confrontation/hearsay issue. The evidence sought in this case

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 478-79.

⁴³ *Id.* at 478 n.31.

was hearsay, in the context, to be introduced by the defendant, not by the prosecution, and ordinarily a party cannot (and usually does not) complain about hearsay weaknesses of evidence that he/she has offered or seeks to introduce. Further, the opponent of the evidence to be offered, i.e., the prosecutor, was not likely to raise a hearsay objection because the court's approach held promise of resolving the difficult compulsory process/classified information issues in the case that might otherwise have turned out to be an obstacle to obtaining a conviction.

Although it was the defendant who wished to introduce the evidence in question, he was not totally in control of the form of the evidence that might be presented. So, this was not a typical situation in which a party may not be heard to complain about hearsay that it offered into evidence.

United States v. Paracha involved a similar context and set of issues and the court relied on the *Moussaoui* approach in addressing the matter. Without calling any special attention to it, the district court in *Paracha* included in the jury instructions an additional ground that bore on the circumstantial reliability of the first level of hearsay in that case:

The failure [on the part of the witnesses/interrogatees] to provide truthful information would be detrimental to any relationship to the United States government by the witnesses.⁴⁴

Like the *Moussaoui* court, the district court in *Paracha* did not, however, address the issues raised by these documents in terms of traditional hearsay categories.

By giving instructions in *Moussaoui* and *Paracha* that the exculpatory⁴⁵ statements contained in the substitutions were reliable, both courts figuratively leaned over backwards in favor of the defendant. Otherwise, absent a resolution of the impasse, the government might have been faced with the

⁴⁴ *United States v. Paracha*, No. 03-CR-1197(SHS), 2006 WL 12768, at *15 (S.D.N.Y. Jan. 3, 2006). The sentence was probably included in the instructions because Paracha's counsel had requested an instruction, which the court rejected, to the effect that the witnesses/declarants in question were providing assistance to the U.S. government. *See id.* at *14 n.2. Instead the court gave the indicated instruction which on its face seemed to suggest that the witnesses had some special relationship to the government, which would motivate them to tell the truth.

⁴⁵ *See Moussaoui*, 382 F.3d at 479-82; *Paracha*, 2006 WL 12768, at *14-16. Note that in *Moussaoui*, the court conceded that not all of the statements in the substitutions were exculpatory. *See Moussaoui*, 382 F.3d at 473. The government had argued that a number of the statements in fact incriminated the defendant. *See id.*

prospect of a court-imposed sanction dismissing the prosecution. In assessing the courts' actions here, it seems fair to conclude that in each of the cases, the court was trying to be responsive to the concerns about whether the defendant's right to make his defenses would be infringed if neither the witnesses requested, nor their depositions, were produced.

What is worth emphasizing, however, is not why both courts did what they did, but rather, what they did. To ensure that each defendant's right to defend himself was not infringed, the courts gave each defendant the benefit of an instruction that the substitutions and the exculpatory statements contained therein were obtained under circumstances that indicated that the statements were reliable.

It is the fact that both courts concluded that a) the statements were obtained for terrorism intelligence purposes ("in aid of the pursuit of terrorists and prevention of acts of terrorism"), and b) that in the circumstances the statements were reliable, which makes it possible to think about deriving arguments regarding confrontation and hearsay issues from these decisions. We discuss these lines of argument in the next section.

*B. Addressing Possible Confrontation and Hearsay Issues
in a Hypothetical Federal Prosecution of a Gitmo
Detainee*

1. A Hypothetical Situation

Suppose that the issue of the admissibility of *Moussaoui*-type substitutions were to arise in a future federal court terrorism prosecution.⁴⁶ Assume, however, that the

⁴⁶ In 2009, Attorney General Eric H. Holder (appointed by President Obama), announced that it had been decided to prosecute some of the Guantanamo detainees in a federal district court in New York City while others would be prosecuted in military commission trials under the rules and procedures established by Congress in the Military Commissions Act of 2006, as amended in 2009. Press Release, U.S. Department of Justice, Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Bay Detainees (Nov. 13, 2009), *available at* <http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html>.

In the military commission proceedings, the statutory rules for dealing with hearsay and coerced confessions are different from the rules applied in civilian courts. (In light of the decision in *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (holding that enemy combatants tried in military commissions could not be deprived access to the federal writ of habeas corpus), a lurking set of questions is whether and to what extent specific constitutional protections will be available to detainees being prosecuted in military commission trials. Specifically, will they be protected by the Confrontation Clause? If so, the discussion in the text regarding confrontation clause

substitutions contain statements *that incriminate the defendant* and resulted from the interrogation of detainees whom the government is unable to produce. Assume further that this time it is the prosecutor who offers the substitutions containing these statements into evidence *against the defendant*.⁴⁷ Admissible? Are there arguments derived from the opinions in *Moussaoui* and *Paracha* doctrine that can be used in addressing this issue?

2. Implications of *Crawford* and *Davis* for the Confrontation Issue

To understand the potential significance of the *Moussaoui* and *Paracha* doctrine applied in confrontation and hearsay contexts, we briefly return to the Supreme Court's decisions in *Crawford v. Washington* and *Davis v. Washington*. Recall that *Davis* qualified *Crawford* by ruling that not all statements obtained from police questioning are testimonial. We quote again from the text, *supra*, that describes the

issues would be relevant as well to military commission proceedings. *Cf.* *Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010) (holding that Confrontation Clause does not apply in habeas corpus suits, applies only in criminal cases). The discussion in the text regarding a hypothetical prosecution assumes that it occurs in a federal district court. Given the impending prosecutions, the issues addressed in the hypothetical situation could turn out to be not quite so hypothetical.

⁴⁷ A question may be raised as to whether this hypothetical scenario is realistic. Is the government likely to attempt to introduce against one of the Guantanamo detainees on trial for terrorist offenses a statement implicating him obtained through government interrogation from one of his alleged accomplices? Attempting to introduce into evidence against a defendant an accomplice's statement obtained by the police is not an uncommon practice.

Of course, if the witness/declarant is in government custody, under the confrontation doctrine applicable in the federal courts, the government would have an obligation to produce him if he was available, rather than use his hearsay statement. One can imagine situations, however, in which the witness/declarant is unavailable. He might, for example, as some terrorist detainees have done, refuse to cooperate with the proceedings, or he may be unavailable for some other reason.

Whether in a real case, the use of the *Moussaoui*-type substitutions would be involved if the government were attempting to offer a detainee's statement into evidence might depend on the circumstances. If the detainee-declarant is unavailable, the government might offer into evidence the fruits of its interrogation of that individual, which might be in the form of intelligence reports gleaned from interrogations conducted for intelligence purposes. If these intelligence reports contained sensitive information, there might be a need to summarize them and prepare the same kind of substitutions used in the *Moussaoui* case. On the other hand, if there were no need to classify information in the report, preparing summaries and substitutions would not be necessary. Note that at the time, in *Moussaoui*, the government was not even willing to admit that it had the witness/declarants in custody.

grounds for distinguishing between testimonial and nontestimonial statements:

The distinction rests principally on what was “the primary purpose of the interrogation.” If the interrogation is “solely directed at establishing the facts of a past crime, in order to . . . provide evidence to convict . . . the perpetrator,” it is testimonial. If its primary purpose was “to meet an ongoing emergency,” or was “designed primarily . . . to describe current circumstances requiring police assistance,” it is non-testimonial.⁴⁸

Given the distinction drawn by *Davis*, an argument can be made, based on *Moussaoui-Paracha*, for addressing the confrontation concerns posed in our hypothetical situation. Those two courts indicated that in those cases the purpose of the interrogation of the suspected terrorists (the ECWs) by government agents was to provide intelligence to prevent other catastrophic terrorism events from occurring and to apprehend other dangerous terrorists. The two cases relied on the fact that the government interrogators had a purpose other than trying to obtain evidence to convict the suspected terrorists. Generally, the existence of such an alternative purpose avoids many of the concerns that lie behind the *Crawford* doctrine. But, as mentioned below, *Davis* is subject to varying interpretations. Does the alternative purpose of the interrogation fall within the specific terms of the *Davis* doctrine?

While this alternative purpose may not have involved an “ongoing emergency,” it is arguable that it was intended to obtain information regarding “current circumstances requiring police assistance [action?].” Preventing terrorism events that may soon happen may not amount to an “ongoing emergency” of the very immediate type involved in *Davis* (although even that point is debatable), but it has some similar characteristics. Certainly, the government can argue that the purpose of the interrogation was geared to an urgent need to obtain information quickly in order to prevent the occurrence of serious terrorism events that could occur at almost any time. If the interrogations occurred in the immediate aftermath of 9/11, the argument would be bolstered. Most importantly, it can be emphasized that the primary purpose of the interrogation *was not* to establish the facts of a past crime.

⁴⁸ See *supra* text accompanying notes 13-15.

What is the likelihood that prosecutors in future cases would be successful in using this application of *Moussaoui-Paracha* as a basis for responding to the serious confrontation concerns posed in our hypothetical situation? It has been suggested by scholars that Justice Scalia's opinion in *Davis* leaves room for differing interpretations of the kinds of police questioning that fall under the nontestimonial label; that the phrases used, such as "primary purpose" and "ongoing emergency" are "extremely ambiguous" and the ambiguity enables the judges to manipulate the concepts.⁴⁹ Some scholars have focused on the requirement of an ongoing emergency.⁵⁰ Still others suggest that the *Crawford-Davis* testimonial test is "almost arbitrary in its result" and no better than the earlier reliability approach.⁵¹

If the courts were prepared to invoke the *Moussaoui* doctrine in this way, they would want to be certain that the result would not open the door to application of the doctrine in ordinary criminal prosecution contexts. Suppose, for example, that in an ordinary prosecution the police claim the purpose of the interrogation is to discover information that would be helpful in apprehending one of the defendant's partners, not to help convict the defendant. One can imagine that the courts would formulate some kind of limiting principle(s) to avoid such a result—e.g., that the alternative purpose must not be ad hoc but must amount to a sustained and continuing intelligence-gathering effort, or as in *Davis*, must be the "primary purpose."⁵² In *Davis*, the emergency nature of the situation may also be viewed as the Court's way of limiting the

⁴⁹ See Richard D. Friedman, *Crawford, Davis and Way Beyond*, 15 J.L. & POL'Y 553, 563 (2007) (describing the potential for unpredictable and unfair rulings after *Davis*); see also Myrna S. Raeder, *Domestic Violence Cases after Davis: Is the Glass Half Empty or Half Full?* 15 J.L. & POL'Y 759, 775-77 (2007).

⁵⁰ See, e.g., Roger Kirst, *Confrontation Rules after Davis v. Washington*, 15 J.L. & POL'Y 635, 641-44 (2007). Professor Kirst also details in his article how in the wake of the *Davis* decision the Supreme Court disposed of cases applying the *Davis* criteria.

⁵¹ Raeder, *supra* note 49, at 776. While ambiguous general terms were used in the *Davis* opinion, Justice Scalia did, however, also mention specific facts that can be argued to limit the scope of application of the doctrine. For example, the fact that the interrogations took place in a calm setting and the statements were made in response to a series of questions with the "officer-interrogator taping and making notes of . . . [the] answers" were mentioned as factors in favor of treating the statements as testimonial. *Davis*, 547 U.S. at 827. Invocation of such specific facts from the *Davis* situation, would provide a basis for arguing that the *Davis* exception should not be applicable in our hypothetical situation. See Raeder, *supra* note 49, at 775-76.

⁵² Compare the "significant purpose" standard established for obtaining a warrant under the FISA statute. Cf. 50 U.S.C. §§ 1803, 1804(a)(7)(B) (2006).

scope of the exception. In our hypothetical, the exigency and urgency of finding other terrorists before they perpetrate acts of catastrophic terrorism may be viewed as a similar type of limitation.⁵³

One might reasonably expect that the rationale of *Moussaoui-Paracha* would be invoked by the government to address the confrontation issue thus raised. While, given the arguments that can be made on both sides of the testimonial-nontestimonial issue, invocation of *Moussaoui-Paracha* would not guarantee that the government would prevail, it does provide a line of plausible, nonfrivolous arguments on the confrontation issue. In a prosecution of a serious terrorist defendant, such an argument would have a reasonable chance of success.

3. Addressing the Hearsay Issues in the Hypothetical Prosecution

If the government were successful on the confrontation issue, there would be a further set of questions to consider. As Justice Scalia wrote in *Crawford*, “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law”⁵⁴ If a court were to conclude that the statements at issue in our hypothetical situation are nontestimonial under *Davis* and therefore not inadmissible under the Confrontation Clause, it would be necessary to address the question whether the statements are nevertheless inadmissible under the jurisdiction’s rules governing hearsay.

The hypothetical case assumes a prosecution in a federal court; accordingly, the Federal Rules of Evidence would be applicable. Here, too, *Moussaoui-Paracha* appears to provide a basis for developing a line of arguments to address the

⁵³ Compare the following: On March 1, 2010, the Supreme Court granted certiorari on the question:

whether preliminary inquiries of a wounded citizen concerning the perpetrator and the circumstances of his shooting are nontestimonial because they were “made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,” that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual?

Michigan v. Bryant, No. 09-150. 2010 WL 680519, at *1 (U.S. Mar. 1, 2010).

⁵⁴ Crawford v. Washington, 541 U.S. 36, 67 (2004).

hearsay issues. We have previously described the several levels of hearsay involved in the *Moussaoui* case, and the rationales articulated by the Fourth Circuit in support of the reliability of all of those hearsay levels. We also identified the most serious hearsay weakness in the multiple levels of out-of-court statements—the fact that the original statements resulting from the interrogation do not appear to have any special indicia of reliability. How would the hearsay issues thus raised play out under the Federal Rules of Evidence?

a. Qualifying Levels 2-4 Under the Federal Rules

In addressing the admissibility of levels 2-4 in our hypothetical situation, conceivably, the prosecutor might invoke Federal Rule of Evidence 807, the Residual Exception, which deals with “[a] statement not specifically covered by Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness”⁵⁵ and then rely on the type of arguments made in *Moussaoui* regarding the reliability of the documents at issue there.⁵⁶

More likely, however, the prosecution would first argue that all of the levels of hearsay except the first level, i.e., the interrogatee’s statements, fall under the hearsay exception set forth in Rule 803(8), Public Records and Reports, which provides:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel . . . unless the sources of information or other circumstances indicate lack of trustworthiness.⁵⁷

Recall that the materials in question in our hypothetical—i.e., the substitutions—are based upon 1) the statements made by the interrogatee, 2) the recording of those statements, in direct or indirect form, in reports, 3) the summaries of those statements and 4) the reorganizing of that material to make up the final form of the substitutions. An

⁵⁵ FED. R. EVID. 807.

⁵⁶ There are additional requirements in Rule 807, for example, that the evidence is “more probative on the point than any evidence which the proponent can reasonably procure,” but we focus here on the equivalent trustworthiness element. *Id.*

⁵⁷ FED. R. EVID. 803(8).

argument can plausibly be made that levels 2) to 4) of the stages in the preparation of these substitutions amount to the preparation of reports by public officials under a duty to report within the meaning of Rule 803(8). The key question would then be whether they fall within the exclusion in that section applicable to criminal cases, for matters observed by police officers and other law enforcement personnel.

An often-cited case on the exclusion for police officer observations is *United States v. Quezada*⁵⁸ which addressed the exclusion clause in the following terms:

While some courts have inflexibly applied the Rule 803(8)(B) proscription to all law enforcement records in criminal cases, . . . we are not persuaded that such a narrow application of the rule is warranted here. The law enforcement exception in Rule 803(8)(B) is based in part on the presumed unreliability of observations made by law enforcement officials at the scene of a crime, or in the course of investigating a crime: ostensibly, the reason for this exclusion is that observation by police officers at the scene of the crime or the apprehension of the defendant were not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

. . . .

. . . This circuit has recognized that Rule 803(8) is designed to permit the admission into evidence of public records *prepared for purposes independent of specific litigation*. . . . In the case of documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present. Due to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter . . . , such records are, like other public documents, inherently reliable.⁵⁹

Quezada thus reasoned that the basis for the exclusion was that police officer observations at the scene are not reliable whereas other types of public official observations that have inherent reliability are not within the exclusion, such as records prepared for purposes independent of specific litigation—situations where there is a lack of any motivation

⁵⁸ 754 F.2d 1190 (5th Cir. 1985).

⁵⁹ *Id.* at 1193-94 (emphasis added) (citations omitted) (internal quotation marks omitted).

on the part of the official to do other than mechanically register unambiguous factual matters.

It is arguable that the *Moussaoui* alternative purpose—the motivation to obtain accurate intelligence that could be acted upon by agents in the field in order to prevent future terrorist actions, not to gather evidence to be used in litigation—provides comparable grounds for concluding that the recordings and reports of the statements contained in the substitutions are “inherently reliable.”

Thus, some of the same arguments for treating the substitutions as nontestimonial under the *Crawford* confrontation doctrine, can be invoked to support qualifying all but the first level of hearsay in the substitutions under Rule 803(8) of the Federal Rules of Evidence, and for not applying the criminal case/matters-observed-by-police exclusion in that rule.

However, the ultimate admissibility of levels 2-4 is dependent under Rule 803(8) on whether “the sources of information . . . indicate a lack of trustworthiness.”⁶⁰ If the statements made by the detainee-declarants as summarized in the substitutions are deemed unreliable and “indicate a lack of trustworthiness,” nothing of the substitutions—that is, levels 2-4—is admissible.⁶¹

⁶⁰ FED. R. EVID. 803(8).

⁶¹ The *Moussaoui* arguments discussed in the text up to this point can be offered in support of the reliability of the reporting, summarizing and recordings actions of the government agents and to respond to any questions raised *with respect to* levels 2-4 under the last clause of Rule 803(8), “unless the sources of information or other circumstances indicate a lack of trustworthiness,” FED. R. EVID. 803(8), but the question of the reliability of the first level statements remains and must be separately treated.

In *Crawford*, Justice Scalia stated that business records, which are analogous to public records are “by their nature . . . not testimonial.” *Crawford v. Washington*, 541 U.S. 36, 56 (2004); *see also, e.g.*, *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005) (per curiam) (holding items in an immigration file akin to business records are non-testimonial in nature).

Regarding the question of whether the business records exception in the FED. R. EVID. 803(6), Records of Regularly Conducted Activity, which does not have a criminal case/matters-observed-by-police exclusion might be used in lieu of FED. R. EVID. 803(8), *see United States v. Oates*, 560 F.2d 45, 78 (2d Cir. 1977). Numerous cases have interpreted and limited *Oates*. These authorities are collected in JACK B. WEINSTEIN, JOHN H. MANSFIELD, NORMAN ABRAMS, MARGARET A. BERGER, EVIDENCE—CASES AND MATERIALS 710-14 (9th ed. 1997).

b. Can the Interrogatees' Statements (Level 1) Be Qualified Under the Federal Rules?

i. Intrinsic Circumstantial Reliability

As previously mentioned, the first level of hearsay, the interrogatee's statements to the government agents in response to questioning, presents the most problematic of the hearsay issues raised in the hypothetical situation.

The hearsay issue thus posed falls within the general category of a declarant's statements resulting from police interrogation being offered into evidence by the prosecution in the trial of his alleged accomplice. Efforts have often been made in the past, relying on the declaration against penal interest exception, to introduce such statements into evidence. It has been argued that such statements have intrinsic reliability that comes from being against the penal interest of the declarant. The asserted "against interest" features of a statement that inculcates a co-conspirator are, however, a complicated subject that has been addressed by scholars⁶²; and the Supreme Court, in a series of cases culminating in *Lilly v. Virginia*,⁶³ usually ruled against the admissibility of such statements.

Conceivably, there might be some other type of special circumstances that would be suggestive of intrinsic circumstantial reliability of interrogation statements. A possible example of such a special circumstance might be the kind of facts underlying the aforementioned instruction given in the *Paracha* case, which suggested that the declarants had a motive to tell the truth arising out of the fact that they had developed a relationship with the government interrogators which they were interested in maintaining.⁶⁴ The implication was that to lie to the interrogators would put that relationship at risk.

⁶² See generally, e.g., Daniel J. Capra, Essay, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L. REV. 2409 (2005); John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797 (2001); Sarah D. Heisler, *My Brother, My Witness Against Me: The Constitutionality of the "Against Penal Interest" Hearsay Exception in Confrontation Clause Analysis*, 90 J. CRIM. L. & CRIMINOLOGY 827 (2000); Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia*, 53 SYRACUSE L. REV. 87 (2003).

⁶³ 527 U.S. 116, 116-17 (1999).

⁶⁴ See *supra* note 44, and accompanying text.

This type of rationale is a weak ground for a claim of circumstantial reliability. Would it mean, for example, that the hearsay statements of an informer who works regularly with the police should be viewed as having intrinsic reliability because of his desire to maintain the relationship and whatever benefits accrue to him therefrom?

Whatever the merits of this specific type of claim, the *Paracha* instruction is an example of a claim of reliability based upon specific facts for a hearsay statement that does not fall under a specific exception. To be independently qualified, the statement would have to meet the standards of Rule 807, the Residual Exception, that is, circumstantial guarantees of trustworthiness equivalent to those under Rule 803 or 804.⁶⁵

We also learn from *Lilly v. Virginia*, however, (which was decided under pre-Crawford confrontation-trustworthiness standards), that under the then-applicable constitutional doctrine, the requirements for meeting residual trustworthiness standards in a case involving accomplice hearsay resulting from government interrogation and inculcating a criminal defendant are likely to be very difficult to meet:

It is clear that our cases consistently have viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of those "hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability." . . . The decisive fact, which we make explicit today, is that accomplices' confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence.

. . . .

The residual "trustworthiness" test credits the axiom that a rigid application of the Clause's standard for admissibility might in an exceptional case exclude a statement of an unavailable witness that is incontestably probative, competent, and reliable, yet nonetheless outside of any firmly rooted hearsay exception When a court can be confident—as in the context of hearsay falling within a firmly rooted exception—that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility," the Sixth Amendment's

⁶⁵ The claim of reliability would also be relevant to the issue regarding levels 2-4 under FED. R. EVID. 803(8) applying the clause, "unless the sources of information . . . indicate lack of trustworthiness." See *supra* notes 60-61 and accompanying text.

residual “trustworthiness” test allows the admission of the declarant’s statements.

....

It is highly unlikely that the presumptive unreliability that attaches to accomplices’ confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice—that is, when the government is involved in the statements’ production, and when the statements describe past events and have not been subjected to adversarial testing.⁶⁶

Although the Court’s expressed view of the “presumptive unreliability that attaches to accomplices’ confessions that shift or spread blame,” was written in a setting involving a constitutional issue under pre-*Crawford* standards, it would seem to bear generally on questions regarding the unreliability of such statements. It suggests that invocation of the *Moussaoui-Paracha* rationale based on a claim of intrinsic reliability because of special circumstances relating to the declarant’s statements would be faced with a strong presumption of unreliability.

ii. Extrinsic Circumstantial Reliability

A closer examination is also warranted of the specific elements underlying the *Moussaoui* court’s conclusion that the first level statements are sufficiently reliable based on extrinsic factors, that is, not arising from the intrinsic nature and content of the statement or motive of the declarant, but rather from the motivation and methods of the government agents who obtained the statements from the ECWs. The question is whether these factors, which were relied upon by the court in *Moussaoui*, are sufficient to establish circumstantial trustworthiness for purposes of Rule 807.⁶⁷

The motivation and methods argument advanced by the court in *Moussaoui* can be broken down into three parts. The first part takes the following form: Ordinary police interrogators are motivated to obtain convictions—whether of

⁶⁶ *Lilly*, 527 U.S. at 133-34, 136-37 (alterations in original) (citations omitted).

⁶⁷ That is, whether the motivation of the interrogators to obtain accurate information (plus the implied appeal to the expertise of the interrogators) and the fact that the process of interrogation is “well designed” for such a purpose, are in combination sufficient circumstantial guarantees of the reliability of the statements. See FED. R. EVID. 807.

the person being interrogated or other persons. That motivation may shape how they question and the direction of their questioning. Government intelligence agents, such as those who interrogated the ECWs, are motivated to find other terrorists and prevent terrorist actions. They need completely accurate information for this purpose. They have no motivation to shape the direction of the information they obtain other than in ways designed to ensure that totally accurate information is obtained that will help them find terrorists and prevent acts of terror. However, it is a long leap to conclude that, because the interrogators are motivated to obtain accurate information they do indeed obtain accurate information from the persons whom they have interrogated.⁶⁸

The second part of the argument which can be inferred from the *Moussaoui* opinion assumes that the interrogators have special expertise. What kind of expertise? We assume the claim is that the interrogators are persons of high intelligence, sensitivity and psychological insight who are able to make judgments about people, the logic of their stories, and to discern factual inconsistencies and flaws in the stories being told; that they also have the ability to make judgments about personalities, mannerisms, candor, dissembling, disingenuousness and the like, that make them specially capable of distinguishing truth-telling from false stories or

⁶⁸ There is a different tack that might be taken in addressing the *Moussaoui* court's conclusion that the statements of the ECWs were reliable—namely, introducing nonhearsay evidence regarding the reliability of the statements in an effort to meet the reliability threshold of FED. R. EVID. 807. The court's comments suggested that the government agents viewed these statements as reliable; the implication was also that the government used and acted upon the information from the ECWs in the work done by government agents in the field to apprehend terrorists and prevent acts of terrorism. Suppose the question is whether testimony regarding such government actions should be admissible to prove the reliability of the statements made by the ECWs—that is, offering the government's actions to prove the belief of the government to prove the existence of that fact believed, i.e. the reliability of the statements. That tack is similar to what was done in the classic English evidence-hearsay case, *Wright v. Tatham*, (1837) 112 Eng. Rep. 488, 494-95 (Exch. Ch.). In that case, of course, a number of the justices concluded that the evidence in question was hearsay. *Id.* at 516-17. The definition of hearsay used in the Federal Rules of Evidence, however, excludes “from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion.” FED. R. EVID. 801(a) advisory committee's note. Accordingly, the actions of the government in this regard would not be treated as hearsay under the Federal Rules. *Cf.* CAL. EVID. CODE § 1200 cmt. (West 2009) (“[T]here is frequently a guarantee of the trustworthiness of the inference to be drawn from . . . nonassertive conduct because the actor has based his actions on the correctness of his belief, i.e., his actions speak louder than words.”).

stories that have some falsity in them.⁶⁹ Most judges are likely to be skeptical about such claims of expertise, especially about whether they are strong enough to support a finding of reliability.

The third part of the argument is that the process of questioning is “well designed” to obtain accurate information. What was the court referring to here? At the time, the government was not willing to acknowledge that it had the suspects in custody or that it had been interrogating them. Accordingly, there was no need to specify the methods used in interrogating them. We assume, however, that if special methods were being used in such interrogations, the government would try to keep the methods confidential and protected by the mantle of classified information. So we are faced with a factual claim that we are not able to assess because the facts relating to it are not available or likely to become available. Of course, such facts might be made available to the court in camera, and the court would be able to make a judgment (as the *Moussaoui* court apparently did) as to whether the nature of the process of interrogation assured that the statements obtained were sufficiently reliable.

In the absence of more specific information, we can only make some very general and highly speculative observations about what might be the design of a process of interrogation that would assure sufficient reliability. If the process involved the use of any form of coercion, apart from the due process and related claims that might be raised, the very use of coercion would tend to cast doubt on the reliability of the statements made. Or suppose the process involved the use of lie detectors, and that is the basis for the court’s judgment of sufficient reliability? Again, a Pandora’s Box of issues would be opened by such a claim. Suppose that drugs were used in interrogating the suspects? Again, due process issues would arise out of such a process. Or suppose that the government used some type of special psychological or other techniques, not involving any prohibited coercion, in eliciting the statements from the suspects?⁷⁰

⁶⁹ The assumption thus seems to be that the persons who conduct the CIA (and other similar agencies) interrogations of terrorist suspects are much better at their job than police who conduct ordinary crime interrogations. We do not have enough information to make a judgment about the validity of such a claim.

⁷⁰ See Steven Kleinman and Matthew Alexander, Op-Ed, *Try a Little Tenderness*, N.Y. TIMES, March 11, 2009, at A31. The authors of this article describe themselves as “military interrogators” who have questioned “hundreds of prisoners”

It is impossible to evaluate the soundness of a claim of sufficient circumstantial reliability without knowing the specific facts underlying the claim. Accordingly, the ultimate resolution of the claim of sufficient reliability based on the methods of interrogation must here be left hanging in the air. It would be very troubling, however, if in connection with such an issue classified information is provided to the judge regarding the interrogation techniques used—information not available to the public—and the judge bases a ruling in favor of admissibility on such information.⁷¹

The arguments advanced in *Moussaoui* and *Paracha* for the circumstantial reliability of the first hearsay level of interrogation statements—whether grounded in intrinsic or extrinsic grounds—do not appear to be strong enough to warrant admissibility under the Federal Rules, neither under a specific exception nor under the residual exception of Rule 807. Claims that the purpose of the interrogations is to obtain intelligence and that the questioners’ motivation, expertise and methods enable them to obtain truthful information and gauge when it is truthful—though interesting and creative—do not in the end seem to be logically strong enough or to be supported by sufficient factual information to overcome the “presumptive unreliability that attaches to accomplices’ confessions that shift or spread blame . . . when the government is involved in the statements’ production, and when the statements describe past events and have not been subjected to adversarial testing.”⁷²

V. CONCLUSION

The rationale articulated by the judges in *Moussaoui-Paracha* provides the government with a line of arguments to

and detainees and “supervised thousands of other interrogations.” *Id.* They describe a technique that they have used successfully that involves building a relationship with the person being interrogated—one based on trust, using an approach that requires familiarity with the detainee’s language and culture and involves a study of each prisoner’s case and then uses charisma and empathy to elicit intelligence. *See id.* They also propose a scientific approach to improving interrogation techniques and the establishment of a research center that would establish “a clear and stringent standard of conduct and ethics and build[] a cadre of skilled interrogators.” *Id.*

⁷¹ A serious classified information-making one’s defenses question would arise: Suppose the court concludes, based upon classified information about the interrogation process, that that process is well designed to ensure sufficient reliability. Suppose also, however, that the court denies access by the defendant to this classified information and the defendant is therefore unable to respond to and argue against that conclusion. Has not the defendant been denied the right to make his defenses?

⁷² *Lilly v. Virginia*, 527 U.S. 116, 137 (1999).

use in federal court terrorism prosecutions when offering into evidence hearsay statements, which are obtained by the government through questioning for intelligence purposes and which incriminate the defendant. More specifically, it suggests a pathway to explore confrontation-testimonial concerns and reliability-hearsay issues under the Federal Rules in regard to statements obtained from subsequently unavailable declarants.

The weakest link in the argument involves the application of the rationale to the admissibility question at the first level of hearsay—that is, the admissibility of the actual statements made by the interrogatee. The arguments that the substitutions are nontestimonial under *Crawford* and *Davis* and that all but the first level of hearsay in the reports/summaries/substitutions meet the standards of Rule 803(8), while certainly far from conclusive, have a reasonable chance of being successful.⁷³

While the suggested arguments that the government might make regarding the first level hearsay issue are creative, it seems unlikely that in a normal trial setting the government would (or should) prevail on that issue.⁷⁴ The court's argument—that the statements made by the interrogatees have circumstantial reliability because the government interrogators had a strong motivation to obtain accurate information or because the process of interrogation was “well designed” to produce accurate information—runs directly counter to traditional judicial concerns about the risks that arise from government interrogations, as reflected both in Justice Scalia's opinion in *Crawford* as well as Professor Berger's views in her 1992 law review article.

The *Moussaoui* reliability assertions were made in a compulsory process setting. There may be doubts whether even in that setting it should be permissible to attribute reliability to statements that do not have sufficient indicia of

⁷³ But success here does not coincide with admissibility. Under FED. R. EVID. 803(8), unless the sources have sufficient trustworthiness, the evidence does not come in. See FED. R. EVID. 803(8).

⁷⁴ However, the same type of background concerns that may have influenced the *Moussaoui* and *Paracha* courts to articulate and then apply a reliability rationale in a compulsory process context—that is, concerns about releasing dangerous terrorists—are likely also to be present in future terrorism prosecutions. Potentially, these same kinds of concerns may exert some influence on judges, leading them to take advantage of the type of doctrinal lifeline that *Moussaoui-Paracha* might be seen as providing regarding confrontation/hearsay issues. Accordingly, it would be foolish to make a firm prediction that the government would be unlikely to succeed on these issues in future terrorism trials in the federal courts.

circumstantial reliability. Be that as it may, we should not be misled by reliability attributions made in a compulsory process setting to conclude that such statements should necessarily be admissible under hearsay rules against a criminal defendant.⁷⁵

It is noteworthy that, in the end, the hearsay statements at issue are most likely to founder not on confrontation grounds as reflected in *Crawford* and *Davis*, but rather on old-fashioned reliability concerns, as now only reflected in federal and state rules of evidence. The message is that while *Crawford* and *Davis* set up an *additional* barrier to admissibility framed in terms of the testimonial-nontestimonial distinction, a reliability standard also continues to be applicable, based not in the Constitution but on the rules of evidence.⁷⁶

⁷⁵ See Peter Westen, *Confrontation and Compulsory Process: A Unified theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 627 n.167 (1978) (concluding that in determining whether exculpatory evidence has sufficient assurances of reliability to be admissible under compulsory process doctrine one should refer as a benchmark to whether incriminating evidence “would be deemed to possess sufficient ‘indicia of reliability’ to be admissible against the defendant under the due process clause” (citations omitted)).

Professor Westen thus reasons from the reliability of incriminating evidence to the reliability of compulsory process-exculpatory admissible evidence. The issue posed by our hypothetical situation is the reverse: the question is whether sufficient reliability for admissibility of compulsory process exculpatory evidence should therefore be deemed sufficient reliability to make the evidence admissible where it is incriminatory of the defendant and raises confrontation-hearsay issues. At other places in the article, Professor Westen seems to indicate that the standards of admissibility under both the Confrontation and Compulsory Process Clauses should be the same. See *id.* at 601 (“[T]he principles of confrontation and compulsory process are substantially identical While the prosecution is under a further obligation to present its evidence in reliable form, it is compelled to do so not by the confrontation clause but by the due process clause.”); see also *id.* at 598 (“The due process clause prohibits the state . . . from using any single item of evidence against a defendant which is inherently too unreliable for rational evaluation by the jury.”).

⁷⁶ See Tom Cummins, Comment, *Danforth v. Minnesota: The Confrontation Clause, Retroactivity, and Federalism*, 17 GEO. MASON L. REV. 255, 271-72 (2009).